

Environmental Protection Agency

§ 35.6570

costs in determining which bid is lowest. The recipient may only use payment discounts to determine the low bid when prior experience indicates that such discounts are usually taken advantage of; and

(v) If there is a sound documented reason, the recipient may reject any or all bids.

(c) *Competitive proposals.* The technique of competitive proposals is normally conducted with more than one source submitting an offer, and either a fixed-price or cost-reimbursement type contract is awarded. It is generally used when conditions are not appropriate for the use of sealed bids. If the recipient uses the competitive proposal method, the following requirements apply:

(1) Recipients must publicize requests for proposals and all evaluation factors and must identify their relative importance. The recipient must honor any response to publicized requests for proposals to the maximum extent practical;

(2) Recipients must solicit proposals from an adequate number of qualified sources;

(3) Recipients must have a method for conducting technical evaluations of the proposals received and for selecting awardees;

(4) Recipients must award the contract to the responsible firm whose proposal is most advantageous to the program, with price and other factors considered; and

(5) Recipients may use competitive proposal procedures for qualifications-based procurement of architectural/engineering (A/E) professional services whereby competitor's qualifications are evaluated and the most qualified competitor is selected, subject to negotiation of fair and reasonable compensation. This method, where price is not used as a selection factor, may only be used in the procurement of A/E professional services. The recipient may not use this method to purchase other types of services even though A/E firms are a potential source to perform the proposed effort.

(d) *Noncompetitive proposals.* (1) The recipient may procure by noncompetitive proposals only when the award of a contract is infeasible under small

purchase procedures, sealed bids or competitive proposals, and one of the following circumstances applies:

(i) The item is available only from a single source;

(ii) The public exigency or emergency for the requirement will not permit a delay resulting from competitive solicitation (a declaration of an emergency under State law does not necessarily constitute an emergency under the EPA Superfund program's criteria);

(iii) The award official authorized noncompetitive proposals; or

(iv) After solicitation of a number of sources, competition is determined to be inadequate.

(2) When using noncompetitive procurement, the recipient must conduct a cost analysis in accordance with the requirements described in § 35.6585 of this subpart.

§ 35.6570 Use of the same engineer during subsequent phases of response.

(a) If the public notice clearly stated the possibility that the firm or individual selected could be awarded a contract for follow-on services and initial procurement complied with the procurement requirements of this subpart, the recipient of a CERCLA remedial response Cooperative Agreement may use the engineer procured to conduct any or all of the follow-on engineering activities without going through the public notice and evaluation procedures.

(b) The recipient may also use the same engineer during subsequent phases of the project in the following cases:

(1) Where the recipient conducted the RI, FS, or design activities without EPA assistance but is using CERCLA funds for follow-on activities, the recipient may use the engineer for subsequent work provided the recipient certifies:

(i) That it complied with the procurement requirements in § 35.6565 of this subpart when it selected the engineer and the code of conduct requirements described in 40 CFR 31.36(b)(3).

(ii) That any CERCLA-funded contract between the engineer and the recipient meets all of the other provisions as described in the procurement requirements in this subpart.

(2) Where EPA conducted the RI, FS, or design activities but the recipient will assume the responsibility for subsequent phases of response under a Cooperative Agreement, the recipient may use, with the award official's approval, EPA's engineer contractor without further public notice or evaluation provided the recipient follows the rest of the procurement requirements of this subpart to award the contract.

§ 35.6575 Restrictions on types of contracts.

(a) *Prohibited contracts.* The recipient's procurement system must not allow cost-plus-percentage-of-cost (e.g., a multiplier which includes profit) or percentage-of-construction-cost types of contracts.

(b) *Removal.* Under a removal Cooperative Agreement, the recipient must award a fixed price contract (lump sum, unit price, or a combination of the two) when procuring contractor support, regardless of the procurement method selected, unless the recipient obtains the award official's prior written approval.

(c) *Time and material contracts.* The recipient may use time and material contracts only if no other type of contract is suitable, and if the contract includes a ceiling price that the contractor exceeds at its own risk.

§ 35.6580 Contracting with minority and women's business enterprises (MBE/WBE), small businesses, and labor surplus area firms.

(a) *Procedures.* The recipient must comply with the six steps described in 40 CFR 31.36(e)(2) to ensure that MBEs, WBEs, and small businesses are used whenever possible as sources of supplies, construction, and services. Tasks to encourage small, minority, and women's business utilization in the Superfund program are eligible for funding under Core Program Cooperative Agreements.

(b) *Labor surplus firms.* EPA encourages recipients to procure supplies and services from labor surplus area firms.

(c) *"Fair share" objectives.* It is EPA's policy that recipients award a fair share of contracts to small, minority and women's businesses. The policy re-

quires that fair share objectives for minority and women-owned business enterprises be negotiated with the States and/or recipients, but does not require fair share objectives be established for small businesses.

(1) Each recipient must establish an annual "fair share" objective for MBE and WBE use. A recipient is not required to attain a particular statistical level of participation by race, ethnicity, or gender of the contractor's owners or managers.

(2) If the recipient is awarded more than one Cooperative Agreement during the year, the recipient may negotiate an annual fair share for all Cooperative Agreements for that year. It is not necessary to have a fair share for each Cooperative Agreement. When a Cooperative Agreement is awarded to a recipient with which a "fair share" agreement has not been negotiated, the recipient must not award any contracts under the Cooperative Agreement until the recipient has negotiated a fair share objective with EPA.

§ 35.6585 Cost and price analysis.

(a) *General.* The recipient must conduct and document a cost or price analysis in connection with every procurement action including contract modification.

(1) *Cost analysis.* The recipient must conduct and document a cost analysis for all negotiated contracts over \$25,000 and for all change orders regardless of price. A cost analysis is not required when adequate price competition exists and the recipient can establish price reasonableness. The recipient must base its determination of price reasonableness on a catalog or market price of a commercial product sold in substantial quantities to the general public, or on prices set by law or regulation.

(2) *Price analysis.* In all instances other than those described in (a)(1) of this section, the recipient must perform a price analysis to determine the reasonableness of the proposed contract price.

(b) *Profit analysis.* For each contract in which there is no price competition and in all cases in which cost analysis is performed, the recipient must negotiate profit as a separate element of